No. 08-1245

IN THE
# Supreme Court of the United States

NATIONAL TAXPAYERS UNION,
*Petitioner*,

v.

SOCIAL SECURITY ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
*Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

## BRIEF AMICUS CURIAE OF FREE SPEECH DEFENSE AND EDUCATION FUND, FREE SPEECH COALITION, *ET AL.* IN SUPPORT OF PETITIONER


MARK WEINBERG
WEINBERG & JACOBS
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(301) 468-5500

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
*Attorneys for Amici Curiae*

**Counsel of Record*

May 11, 2009

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . iii

INTEREST OF *AMICI CURIAE* . . . . . 1

SUMMARY OF ARGUMENT . . . . . 3

ARGUMENT . . . . . 6

I. THE COURT OF APPEALS ERRONEOUSLY FAILED TO COMPLY WITH THIS COURT'S MANDATE IN TELEMARKETING ASSOCIATES . 6

A. The Social Security Administration's Application of 42 U.S.C. Section 1320b-10 Censored the National Taxpayer Union's Message . . . . . 6

B. The Court of Appeals Decided an Important Question of Federal Law in Conflict with Telemarketing Associates . . . . . 10

C. The First Amendment Requires Proof of Knowing Falsity or Reckless Disregard of the Truth in the Application of Section 1140 to NTU's Charitable Solicitation . . . . . 15

II. BY MISAPPLYING SCHAUMBURG, AND IGNORING MUNSON AND RILEY, THE COURT OF APPEALS ERRONEOUSLY PERMITTED PUNISHMENT OF FREE SPEECH . . . . . 19

III. THE COURT OF APPEALS' UNPUBLISHED, NON-BINDING DECISION IS AN UNCONSTITUTIONAL EXERCISE OF FEDERAL JUDICIAL POWER OUTSIDE THE BOUNDS OF ARTICLE III . . . . . 22

CONCLUSION . . . . . 27

## TABLE OF AUTHORITIES

Page

U.S. Constitution

Amendment I . . . . . 2, *passim*

STATUTES

42 U.S.C. § 1320(b)-10 (Social Security Act section 1140) . . . . . 2, *passim*

FEDERAL RULES

Rule 32.1, Federal Rules of Appellate Procedure . . . . . 22, 24

CASES

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) . . . . . 5, 25, 26
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) . . . . . 15
Freedman v. Maryland, 380 U.S. 51 (1965) . . . . . 17
Illinois *ex rel.* Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003) . . . 4, *passim*
New York Times v. Sullivan, 376 U.S. 254 (1964) . . . . . 15, 17, 18
Secretary of State of Maryland v. Jos. H. Munson Co., 467 U.S. 947 (1984) . . . . . 4, *passim*
Riley v. Nat'l. Fed'n. of the Blind of N.C., Inc., 487 U.S. 781 (1988) . . . . . 5, *passim*
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) . . . . 4, *passim*

MISCELLANEOUS

Internal Operating Procedures of the U.S. Court of Appeals for the Third Circuit . . . 23, 24
Judicial Business of the United States Courts, 2008 Annual Report of the Director, Administrative Office of the U.S. Courts . . . . 25
Notes of Advisory Committee on 2006 amendments to Rule 32.1 . . . . . 23
H. Schlossberg, Idols for Destruction, (Thomas Nelson, Nashville: 1983) . . . . . 14
Sources of Our Liberties, p. 132 (Perry, R. and Cooper, J., eds.), p. 132 (American Bar Foundation Rev. ed.: 1978) . . . . . 7

## INTEREST OF AMICI CURIAE[1]

This *Amicus Curiae* Brief in Support of the Petitioner is submitted jointly on behalf of:
Free Speech Defense and Education Fund, Inc.,
Free Speech Coalition, Inc.,
The Abraham Lincoln Foundation for Public Policy Research, Inc.,
American Civil Rights Union,
American Conservative Union,
Americans for the Preservation of Liberty,
Concerned Women for America,
Conservative Legal Defense and Education Fund,
Downsize DC.org,
Downsize DC Foundation,
English First,
English First Foundation,
First Amendment Project,
Fitzgerald Griffin Foundation,
Freedom's Call, Inc.,
Gun Owners of America, Inc.,
Gun Owners Foundation,
Heritage Alliance,
The Lincoln Institute for Research and Education,
Media Research Center,
The National Center for Public Policy Research,
Public Advocate of the United States,
The Senior Citizens League,

---

[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Traditional Values Coalition,
U.S. Border Control,
U.S. Border Control Foundation,
U.S. Constitutional Rights Legal Defense Foundation, and
Young America's Foundation
— all of which are nonprofit educational organizations public charities, and social welfare organizations, exempt from federal taxation under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code, whose purposes and activities include the participation in the American political process and the American marketplace of ideas, including the study of, and education and defense regarding, rights guaranteed under the United States Constitution — as well as:
American Target Advertising, Inc.,
ClearWord Communications, Inc., and
Eberle & Associates, Inc.,
which are among the for-profit organizations which help those nonprofit organizations to raise funds and implement programs, dedicated to the protection of First Amendment rights through the reduction or elimination of excessive regulatory burdens which have been placed on the exercise of those rights.

At issue in this case is the constitutionality of a statute — section 1140 of the Social Security Act, 42 U.S.C. section 1320(b)-10(a)(1) (hereinafter "section 1140") — which was misused to uphold significant penalties against the petitioner for engaging in core political speech, entitled to the strongest First Amendment protection possible. These *amici* submit that the court of appeals erred by failing to apply correctly certain precedents of this Court, and that the

decision of the court of appeals, if allowed to stand, would impede the free exercise of core political speech by persons and organizations critical of government policies and programs. These *amici* believe that their perspective on such issues may bring to the attention of the Court relevant matter not already brought to its attention by the parties, and that this brief may be of help to the Court.

## SUMMARY OF ARGUMENT

The National Taxpayer Union's ("NTU") petition concerns the unconstitutional misuse of power granted by Congress to the Social Security Administration ("SSA") to censor a charitable solicitation designed to stir up grassroots support for a private investment alternative to Social Security. Seizing upon section 1140's prohibition against using the words, "Social Security," in a "manner which reasonably could be interpreted or construed as conveying the false impression that" NTU's solicitation was "approved, endorsed, or authorized" by SSA, the SSA imposed a fine of well over a quarter of a million dollars for a mailing critical of the Social Security program. In disregard of the natural assumption that no government agency would put out such uncomplimentary information about itself, the SSA concluded that NTU had violated the "reasonableness" standard of section 1140.

On an appeal alleging violation of NTU's First Amendment rights, the United States Court of Appeals for the Third Circuit cursorily reviewed the administrative record, and concluded that, since "the

government has a substantial interest in protecting Social Security recipients from deceptive mailings," there was no violation of NTU's rights to freedom of speech. National Taxpayers Union v. Social Security Administration (3rd Cir. 2008) ("NTU v. SSA"), p. 5a.[2]

This ruling conflicts directly with Illinois *ex rel.* Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003) where this Court established that the First Amendment permitted regulation of charitable solicitations only upon proof of actual fraud with all the attendant mens rea and procedural protections that are characteristic of a common law fraud prosecution. Ignoring the need for robust and wide-open debate, section 1140 places the SSA at the gateway into the marketplace of ideas, empowering unelected bureaucrats to keep out any communication that they believe to be an unreasonable intrusion upon their proprietary interest in the Social Security program, whether or not the author knew that its communication created a "false impression" that the ordinary recipient would think that the communication had been authorized by SSA.

Also, the court of appeals completely neglected to apply the First Amendment lessons prohibiting the application of a standard of "reasonableness" as a preventive measure against fraud in charitable solicitations, as set forth by this Court in the trilogy of Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State

---

[2] Pagination to Appendix A of Petitioner's Brief.

of Maryland v. Jos. H. Munson Co., 467 U.S. 947 (1984); and Riley v. Nat'l. Fed'n. of the Blind of N.C., Inc., 487 U.S. 781 (1988).

Finally, in a concerted effort to dampen the precedential effect of its superficial and erroneous application of this Court's authoritative precedents, the court of appeals panel slapped a "NOT PRECEDENTIAL" label on its opinion. While such action purports to prevent this decision from binding other panels in the Third Circuit, it does not hinder other courts from invoking the opinion in such as way as to "chill free speech." Nor does it allay suspicion that the court did not give the kind of careful thought and concern that comes with a published opinion. More fundamentally, it raises serious questions about the constitutional propriety of exercising judicial review without the attendant rules of accountability and obligation that follow from the "doctrine of precedent," as so brilliantly and extensively articulated in Anastasoff v. United States, 223 F.3d 898, 899-905 (8th Cir. 2000) by the esteemed and late Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit.

## ARGUMENT

### I. THE COURT OF APPEALS ERRONEOUSLY FAILED TO COMPLY WITH THIS COURT'S MANDATE IN TELEMARKETING ASSOCIATES.

#### A. The Social Security Administration's Application of 42 U.S.C. Section 1320b-10 Censored the National Taxpayer Union's Message.

The Petition for Certiorari under consideration presents the Court with the question whether Congress has empowered a federal government agency to censor criticism of it by public policy organizations, by banning use of the names of the government agencies and programs where those words "**could** be interpreted or construed as conveying, the **false impression** that such item is approved, endorsed, or authorized by the government." (Emphasis added.) The statute in question, 42 U.S.C. section 1320b-10(a)(1), Social Security Act section 1140,[3] as amended

---

[3] "Sec. 1140(a)(1) **No person may use**, in connection with any item constituting an advertisement, **solicitation**, circular, book, pamphlet, or other communication ... alone or with other words, letters, symbols, or emblems— (A) the **words** 'Social Security', 'Social Security Account', 'Social Security System', 'Social Security Administration', 'Medicare', 'Centers for Medicare and Medicaid Services', 'Department of Health and Human Services', 'Health and Human Services', 'Supplemental Security Income Program', or 'Medicaid', the **letters** 'SSA', 'CMS', 'DHHS', 'HHS', or 'SSI'... in a manner which such person knows or should know would convey, or in a manner **which reasonably could be**

(hereinafter "section 1140") was used to accomplish this objective when the Social Security Administration ("SSA") fined the National Taxpayers Union ("NTU"), which had used both the agency's name (Social Security Administration) and program name (Social Security) in doing grassroots lobbying and fund raising. *See* Petition for Certiorari ("Pet. Cert."), pp. 3-5 and Appendix ("App.") A, pp. 2a-4a. Such administrative power is comparable to that exercised by the ancient English Star Chamber which was empowered to regulate trades, businesses, and elections, until it was abolished in 1641 by a law the "main effect of [which] was to establish ... a system of justice administered by the courts instead of by the administrative agencies of the executive branch of the government." *See* Sources of Our Liberties, p. 132 (Perry, R. and Cooper, J., eds.), p. 132 (American Bar Foundation Rev. ed.: 1978).

In this case, the sender of the NTU letter was clearly identified with a return address from the National Taxpayers Union, 108 N. Alfred Street, Alexandria, VA 22314, with a postmark showing that it was sent by a "Non-Profit Org." *See* Third Circuit Joint Appendix, p. A46. Furthermore, the letterhead on the letter inside the envelope was clearly that of the NTU. *See* Pet. Cert., App. C, p. 32a. Thus, even the Administrative Law Judge ("ALJ") concluded that "NTU's mailers do not purport to be *from SSA* itself." Pet. Cert., App. C, p. 29a (italics original).

---

**interpreted or construed** as conveying, the **false impression** that such item is approved, endorsed, or authorized by the Social Security Administration...." (Emphasis added.)

To provoke the recipients to open the envelope, the first version of the NTU mailing included carrier envelope language stating: "OFFICIAL NATIONAL SURVEY ON **SOCIAL SECURITY** COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE **SOCIAL SECURITY ADMINISTRATION**, WHITE HOUSE AND CONGRESS OF THE UNITED STATES." Pet. Cert., App. C, p. 29a, p. 43 (emphasis added). The NTU's use of these two statutorily-sacrosanct phrases led the ALJ to find that "this language, **by itself**, [was] sufficient to establish a section 1140 violation since it **creates the impression** that NTU's survey has official sanction." *Id*., p. 30a. Even after NTU eliminated "Social Security Administration" in its second version, leaving only the phrase "Social Security," the ALJ found "the continued ... use [of] the term 'Social Security'" impermissible in light of the overall design of the mailer. *Id*., p. 38a.

Indeed, the ALJ found fault with all three versions of NTU's mailers on the ground of NTU's "repeated" use of the "protected 'Social Security' words ... established that NTU violated section 1140, without regard to what NTU knew or should have known about how its mailer would be interpreted."[4] Pet. Cert., App. C, p. 43a.

---

[4] The ALJ's reading of the carrier envelope is reminiscent of the human elf Buddy's reaction to the restaurant sign "World's Best Cup of Coffee" when first visiting New York — but Buddy's reaction was understandable, for he had grown up at the North Pole.

Completely missing from the ALJ's analysis is any reference to the substantive policy concerns expressed in the NTU mailers. The ALJ's failure to include a complete textual analysis appears to have been strategic, because it would have been extremely difficult to argue that a recipient reasonably could interpret that the NTU mailing had been authorized by SSA when it is chock-full of commentary critical of the way the Social Security program is being run:

- "SOCIAL SECURITY WILL BEGIN TO RUN OUT OF MONEY AS EARLY AS 2016" (3rd Cir. Joint App., p. A49);

- "the financial structure of Social Security ... MUST BE ADDRESSED NOW OR THE PROGRAM WILL GO BELLY-UP" (*id*., p. A49);

- "No serious politician or government official any longer argues that Social Security ... [is] financially sound" (*id.,* p. A49);

- "NO ONE HAS A LEGAL RIGHT TO THE MONEY THEY CONTRIBUTE TO THE SO-CALLED SOCIAL SECURITY TRUST FUND" (*id*., p.A50); and

- "there is no guarantee nor has there ever been with Social Security" (*id*., p. A50).

All such language demonstrates that the NTU mailing could not possibly have created the impression that it came from a governmental source. Yet, the ALJ opinion, adopted without revision by the SSA, applied

section 1140 to only selected portions of the text, and in doing so, censored NTU's political and policy message. Ironically, by its exclusion from examination of NTU's critique of Social Security, the SSA has demonstrated the truth of the NTU letter's charge that "no one at the Federal Level ... wants to frighten current or future recipients by telling all the facts" (*id.*, p. A50). In silencing NTU's criticisms, the SSA violated NTU's First Amendment rights.

### B. The Court of Appeals Decided an Important Question of Federal Law in Conflict with Telemarketing Associates.

The Rules of the United States Supreme Court counsel granting a petition for a writ of certiorari when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). This petition presents such a case, as the court below improperly rejected petitioner's First Amendment claim in conflict with this Court's ruling in Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

Initially, some might think that Telemarketing Associates is not relevant to this case, but that would be a mistake. While section 1140 applies to communications generally, it identifies "solicitation[s]" as one of the five specifically-named communicative activities governed by its terms. Additionally, section 1140 is aimed at preventing and punishing communications that allegedly create a "false impression that [the communication] is approved,

endorsed, or authorized by the [SSA]." *See* section 1140(a)(1).

The ALJ's decision, adopted by SSA, reveals that the NTU mailing was considered by SSA to be a solicitation designed "to increase [NTU] membership and raise money." Pet. Cert., App. C, p. 18a. According to the ALJ, this particular mailing was launched as part of NTU's program of "direct mail solicitations 'to help' build and maintain grass roots support." Pet. Cert., App. C, p. 27a. Thus, the ALJ found that the references to "Social Security" and other "protected words" were designed "to entice recipients into opening them" (Pet. Cert., App. C, p. 30a), and to induce the recipients "to send [NTU] money." Pet. Cert., App. C, p. 43a. Indeed, the ALJ concluded that "[t]he mailer ... includes the inevitable, and repeated, requests for donations, along with the **ersatz** survey." Pet. Cert., App. C, p. 36a (emphasis added).

By cynically characterizing the NTU mailing as just another effort by a nonprofit corporation in pursuit of "Mammon," the ALJ — and by its affirmance, the SSA — has repeated the mistake that local and state government officials have oftentimes made, and against which this Court has severely admonished: "The First Amendment protects the right to engage in charitable solicitations[,] [because] 'charitable appeals for funds ... involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." Telemarketing Associates, 538 U.S. at 611-12. Not only did the NTU mailing convey important information about what it believed to be the precarious

financial state of the nation's Social Security program, it advocated politically-controversial "personal investment accounts" as a solution to the program's financial woes. (3rd Cir. Joint App., pp. A51-A52.) Yet, the SSA put the kibosh on NTU's disfavored views, imposing a fine in excess of a quarter of a million dollars, ostensibly on the ground that the NTU mailing "reasonably could be interpreted or construed as conveying the false impression that" NTU's message — as unmistakably critical as it was of Social Security — was "approved, endorsed or authorized by the [SSA]." *See* section 1140.

In Telemarketing Associates, this Court painstakingly explained that its well-known trilogy of cases,[5] recognizing the First Amendment's protection of charitable solicitations do not permit "prophylactic measures" designed "to combat fraud by imposing prior restraints on solicitation" based upon a standard of "reasonable[ness]." Telemarketing Associates, 538 U.S. at 612. Instead, the Court explained that its holdings in Schaumburg, Munson, and Riley stand for the First Amendment principle that government efforts to fight fraud by regulation must be aimed only at **actual fraud**, not by regulations "'aimed at **something else** in the hope that it would sweep fraud in during the process.'" Telemarketing Associates, 538 U.S. at 619-20 (emphasis added).

---

[5] *See* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988), discussed in section II, *infra*.

In a further effort to demarcate "the constitutional side of the line," the Telemarketing Associates Court identified five "prime" factors that distinguished an unconstitutional "prior restraint on solicitation, or ... regulation that imposes on fundraisers an uphill burden to prove their conduct lawful." *Id.*, 538 U.S. at 619-20.

First, the Court noted that "in a properly tailored fraud action the State bears the **full** burden of proof." *Id.* (emphasis added).

Second, the Court stressed that "[f]alse statement alone does not subject a fundraiser to fraud liability[;] [instead], the complainant must show that the defendant made a false representation of a material fact **knowing** the representation was false." *Id.* (emphasis added).

Third, "the complainant must demonstrate that the defendant made the representation with the **intent to mislead** the listener." *Id.* (emphasis added).

Fourth, "these showings must be made by **clear and convincing evidence**." *Id.* (emphasis added).

Fifth, "as an additional safeguard responsive to First Amendment concerns, an appellate court could **independently review** the trial court's findings." *Id.* at 621 (emphasis added).

Even though petitioner argued that Telemarketing Associates required the court of appeals to adhere to these First Amendment safeguards, the court below

made absolutely no effort to apply them. The court conducted no "independent review" to ascertain whether SSA had administered section 1140 in such a way as to establish that it had met its full burden of proving by clear and convincing evidence that the NTU made material misrepresentations, knowing them to be false, with the intention of misleading the recipients of its mailing. Instead, the court blithely tossed Telemarketing Associates aside with the observation that "[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech." NTU v. SSA, p. 8a. Thus, the court of appeals dismissed NTU's First Amendment claims by simply stating that "the government has a substantial interest in protecting Social Security recipients from deceptive mailings." *Id.*, p. 5a.

By its summary dismissal, the court of appeals treated the SSA as if it were completely impartial in its assessment of the NTU mailing, interested only in protecting individual Social Security beneficiaries from being hornswoggled. *See* NTU v. SSA, pp. 5a-6a. But the very "nature of bureaucracy belies the old idea that it is apolitical." *See* H. Schlossberg, Idols for Destruction, p. 121 (Thomas Nelson, Nashville: 1983). Indeed, would it be any wonder if the SSA would look differently upon a fundraising effort by admirers of the Social Security Administration than critics like NTU? Without the First Amendment safeguards employed by this Court in Telemarketing Associates, the powers of section 1140 are much too great to entrust, without significant First Amendment safeguards, to the SSA.

### C. The First Amendment Requires Proof of Knowing Falsity or Reckless Disregard of the Truth in the Application of Section 1140 to NTU's Charitable Solicitation.

As this Court observed in Telemarketing Associates, the court of appeals' cursory assessment and deferential dismissal of the First Amendment as applied to NTU's Social Security mailings does not "provide sufficient breathing room for protected speech." *Id.*, 538 U.S. at 620. Citing both New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) and Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 498-511 (1984), this Court has extended the "exacting proof requirements," that are imposed upon "actual malice" determinations in defamation cases involving public officials, to actions against allegedly fraudulent charitable solicitations. *See* Telemarketing Associates, 538 U.S. at 620-21. Indeed, in New York Times, this Court observed that its "duty is not limited to the elaboration of constitutional principles; we must also [make] certain that those principles have been constitutionally applied." New York Times, 376 U.S. at 285. Further, the Court stated that this rule has "particular" application in those cases drawing a line between protected and unprotected speech. *Id.*

Under the peculiar mechanism of section 1140, this case did not come to the court of appeals from a federal district or state trial court. Rather, it came directly to the court of appeals from the Departmental Appeals Board of the Department of Health and Human Services, which, in turn, had conducted a review of an

ALJ decision "limited to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." *See* NTU v. SSA, p. 16a. Thus, the court of appeals was twice removed from the forum in which the findings of fact and conclusions of law were initially made.

Additionally, the trier of fact was not part of the judicial department of government, but part of the executive branch. Not only that, but the trier of fact was part of the executive branch whose "proprietary interest" in the use of the words, "Social Security," was at stake. By vesting power in the Department of Health and Human Services to impose a fine — which it would be required to deposit into the account it administers — "of up to $5,000 ... for each violation" — where each piece of mail containing one or more words, letters, symbols, or emblems in violation of section 1140(a) constitutes "a separate violation"[6] — Congress has failed to provide the kind of impartial, independent judicial review required of a "censorship

---

[6] Section 1140. "(b) The Commissioner ... may, pursuant to regulations, impose a **civil money penalty not to exceed— ... $5,000.**.. against any person for each violation .... In the case of any items ... consisting of pieces of mail, **each such piece of mail** which contains one or more words, letters, symbols, or emblems in violation of subsection (a) **shall represent a separate violation**....

(c)(2) ... Amounts recovered under this section shall be paid to the Secretary and ... to the extent that such amounts are recovered under this section as penalties imposed for misuse of words, letters, symbols, or emblems relating to the Social Security Administration, such amounts shall be **deposited** into the **Federal Old-Age and Survivors Insurance Trust Fund**...." [Emphasis added.]

proceeding." *See* Freedman v. Maryland, 380 U.S. 51, 57-59 (1965).

Congressional protection of the proprietary interest of the SSA in the phrase "Social Security" and its variants — like legislative protection of the interest of government officials in their reputations — does not contribute to the "unfettered interchange of ideas for the bringing about of political and social change desired by the people." *See* New York Times, 376 U.S. at 269. To the contrary, SSA's proprietary oversight pursuant to section 1140 conflicts with the First Amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.*, 376 U.S. at 270. Indeed, section 1140 places SSA as the gatekeeper of the marketplace of ideas, and empowers the SSA to judge the rightness of its own cause pursuant to a standard that would deny entry to that marketplace if the SSA found that a particular charitable solicitation "reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the SSA...." *See* section 1140.

Additionally, section 1140 is predicated upon the proposition that a charitable solicitation "forfeits [First Amendment] protection by the falsity of some of its factual statements," just as was the case in New York Times. *See id.*, 376 U.S. at 271. But as the New York Times Court observed, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or

**administrative officials**." *Id.* (emphasis added). Otherwise, the Court concluded, America's government would no longer be republican in nature, the people having ceded "censorial power ... in the Government over the people." *Id.* at 275. Thus, the Court decided that the First Amendment protected the merely "erroneous statement," which it found "inevitable in free debate,"[7] disallowing only those statements proved to be "made with '**actual malice**' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, 376 U.S. at 279-80 (emphasis added).

This same standard was embraced by this Court in Telemarketing Associates in recognition that — whether the government is protecting its reputation, as in the case of libel of a public official, or protecting the informed choice of donors — the standard of knowing falsity, with all its attendant safeguards, is required by the First Amendment. Surely, such a standard is equally necessary in the case of efforts by the government to secure its proprietary interest in the popular name of a public program, lest the government squeeze communications critical of such programs out of the constitutionally-guaranteed marketplace of ideas.

---

[7] *Id.*, 376 U.S. at 271.

## II. BY MISAPPLYING SCHAUMBURG, AND IGNORING MUNSON AND RILEY, THE COURT OF APPEALS ERRONEOUSLY PERMITTED PUNISHMENT OF FREE SPEECH.

The petitioner contended below that section 1140(a)(1) suffered from a defect similar to the regulatory programs struck down in the 1980's trilogy of cases establishing the Court's parameters for government regulation of charitable solicitations: Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); and Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988). The court of appeals dismissed the argument out of hand, without even a mention of Munson or Riley.

According to the court of appeals, Schaumburg allows a "direct and substantial limitation on protected activity" if "it serves a sufficiently strong, subordinating interest." (Schaumburg, at 636.) Without any analysis, the court below simply assumed that section 1140 met this standard by purportedly protecting seniors and other beneficiaries from fraud, and ensuring that SSA's "legitimate" mail will not be perceived by recipients as "junk mail." *See* NTU v. SSA, pp. 5a-6a.

The court of appeals misread Schaumburg. Although the city ordinance in question there was allegedly designed to prevent fraud against the citizenry, it was determined to be unconstitutional

because it was not tailored narrowly to prohibit actual fraud, the only permissible standard under the First Amendment. Under the court of appeals' misreading of Schaumburg, virtually any kind of communication to the public using the magic words **could** be misread by someone and punished under section 1140(a)(1)'s "reasonableness" standard as having created a "false impression." *See* Pet. Cert., p. 8 and n.19. The First Amendment requires a more precise line than the "impressionistic" one embraced by an Administrative Law Judge so easily swayed by any verbal references to "Social Security."[8] *See, e.g.*, Pet. Cert., App. C, p. 29a.

Had the court of appeals not confined its examination to one aspect of Schaumburg, and had it not ignored Munson and Riley, it could not have summarily dismissed NTU's constitutional claim. In those two cases, respectively, the Maryland and North Carolina governments argued that there was a supposed nexus between fraud and the amount of a charity's solicited funds retained by the solicitor — the greater amount of money retained, the greater likelihood of fraud. This Court rejected this facile approach, concluding that no such lawful nexus existed. *See* Munson, 467 U.S. at 950, and Riley, 487 U.S. at 793.

---

[8] Under the myopic view of the ALJ, if these *amici* were to mail a copy of this *amicus curiae* brief in an envelope bearing the teaser "Critical information about your Social Security benefits," section 1140 could be invoked by the SSA to censor their voices as well.

In Riley, the Court explained why the reasonableness standard does not provide adequate First Amendment protection for charitable solicitations:

> According to the State, we need not worry over … standards for determining "**[r]easonable** fundraising fees [which] will be judicially defined over the years".... Speakers, however, cannot be made to wait for "years" before being able to speak with a measure of security.... And, of course, in every such case, the **fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder**, even if the fundraiser and the charity believe that the fee was in fact fair. **This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates**. *See Munson*, *supra*, at 467 U. S. 969; *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 279 (1964). [Riley, 487 U.S. at 793-94 (emphasis added).]

Like the regulatory schemes held unconstitutional in Munson and Riley, section 1140(a)(1)'s "reasonableness" standard "necessarily chill[s] speech." Indeed, under section 1140(a)(1), NTU did not even get its day in an Article III court, as its words were previously parsed and judged by the very agency that NTU criticized in its mailings. To permit an agency with such a large stake in the outcome, vested with the power to impose a financial death sentence on the

"offending" nonprofit organization — without regard to whether that organization knew that its words created a "false impression," or did not care whether they actually deceived anyone — is the very essence of an unconstitutional abridgement of the First Amendment, and is at direct odds with the Schaumberg trilogy.

## III. THE COURT OF APPEALS' UNPUBLISHED, NON-BINDING DECISION IS AN UNCONSTITUTIONAL EXERCISE OF FEDERAL JUDICIAL POWER OUTSIDE THE BOUNDS OF ARTICLE III.

The court of appeals marked its opinion as "NOT PRECEDENTIAL," thus having no binding precedential effect in the Third Circuit, and erroneously implying that it has no persuasive precedential effect. In response, NTU has concluded its petition with the final argument that "preventing the damaging fiction that [the court's decision] is not a precedent is itself sufficient reason to grant certiorari." Pet. Cert., p. 14. NTU fears — and for good reason — that by so labeling its opinion, the court of appeals will escape review by this Court and that later, notwithstanding its disclaimer, the opinion will still be cited as persuasive authority, chilling protected First Amendment speech. *Id.*, pp. 13-14.

Although the practice of labeling an opinion as "not precedential" is countenanced by Rule 32.1 of the Federal Rules of Appellate Procedure and the Internal Operating Procedures of the U.S. Court of Appeals for the Third Circuit, there are good reasons for this Court to review this case as an exercise of its supervisory

power over lower federal courts. *See* Rule 10(a), Rules of the Supreme Court.

First, there are neither principled guidelines governing whether an opinion should be designated "not precedential," nor nationally-applicable constraints limiting reliance on such an opinion as precedent. As the Notes of Advisory Committee on 2006 amendments to Rule 32.1 state:

> Rule 32.1 ... does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense. **It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.** [*See* Notes of Advisory Committee on 2006 amendments to Rule 32.1 (italics original, bold added).]

Second, although the Third Circuit's Internal Operating Procedures attempt to limit the "not precedential" designation to only those opinions that "appear[] to have value only to the trial court or the parties," the opinion is nevertheless "posted on the court's Internet Website." Third Circuit Internal

Operating Procedures 5.3 (July 2002). It is also available in the Lexis and Westlaw legal databases (2008 U.S. App. LEXIS 25802, 2008 WL 5175066). Thus, the opinion is made readily available for use as precedent in all circuits even though the Third Circuit, "by tradition does **not cite to its not precedential opinions as authority,**" because "[s]uch opinions are **not regarded as precedents that bind the court,"** [having not been] circulate[d] to the full court before filing" *Id.*, 5.7 (emphasis added). The natural tendency in the writing of such opinions will be the absence of the same care and solemnity that would go into those opinions that are circulated to the full court before publication, and intended to be binding as precedent.

Third, since the 1970's, the circuits have treated opinions marked "not precedential" or "not for publication" differently — most circuits placed limits on the parties' ability to cite unpublished opinions, while some completely prohibited such citation (except in cases of issue preclusion). However, on December 1, 2006, Federal Rule of Appellate Procedure 32.1 became effective, which barred the circuits from prohibiting or restricting citation by parties of unpublished opinions issued after January 1, 2007, while still permitting circuits to designate opinions as unpublished or not precedential F.R.A.P. Rule 32.1. Thus, courts of appeals are still permitted to treat unpublished opinions as they see fit, ensuring discontinuity not only among the circuits, but among various judges on the courts of appeals.

Fourth, for the 12-month period ending September 30, 2008, fully 89.7 percent of the Third Circuit's opinions were marked as "NOT PRECEDENTIAL." Judicial Business of the United States Courts, 2008 Annual Report of the Director, Administrative Office of the U.S. Courts, Table S-3. Although this percentage is next to highest among the circuits, the overall percentage of unpublished opinions hovers around 82 percent. Such a high number of unpublished decisions should be a cause for alarm about the quality of the opinions, the accountability of the judges who write them, and the degree to which they are nevertheless relied upon.

As the late Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit summarized in an historical *tour de force* — the practice of designating an opinion to have no precedential effect puts in jeopardy the constitutional principles underpinning the proper exercise of judicial power:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803). This **declaration of law** is authoritative to the extent necessary for the decision, and **must be applied in subsequent cases to similarly situated parties**. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991); *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 399, 5 L. Ed. 257 (1821). These principles, which form

> the **doctrine of precedent**, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to **derive from the nature of judicial power**, and intended that they would **limit the judicial power** delegated to the courts by Article III of the Constitution. **Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional**. [Anastasoff v. United States, 223 F.3d 898, 899-900 (8th Cir. 2000) (vacated on other grounds) (emphasis added, footnote omitted).][9]

As NTU fears, the decision of the court of appeals in this case will be disregarded by nonprofit organizations at their peril. Notwithstanding its "NOT PRECEDENTIAL" mark, this case will assuredly "chill free speech."

---

[9] Significantly, Judge Arnold's research unearthed only one critic of the doctrine of precedent of judicial opinions — Thomas Hobbes, "who regarded the authority of precedent as an affront to the **absolute power** of the Sovereign." *Id.*, p. 900, n.6 (emphasis added).

## CONCLUSION

In granting certiorari in this case, this Court could, and should, simultaneously place the lower federal courts under the constraint of precedent, and the Social Security Administration under the constraint of the First Amendment. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARK WEINBERG
WEINBERG & JACOBS
11300 Rockville Pike
Suite 1200
Rockville, MD 20852
(301) 468-5500

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070

*Attorneys for Amici Curiae*
**Counsel of Record*

May 11, 2009